U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

FILE: [redacted] Office: Vienna Date: JAN 12 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(9)(B)(v)

Public Copy

Identifying ... prevent clearly ... invasion of personal privacy

IN BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

FOR Terrance M. O'Reilly, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The waiver application was denied by the Acting Officer in Charge, Vienna, Austria, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Poland who was admitted to the United States on September 28, 1990 as a nonimmigrant visitor with authorization to remain until March 27, 1991. The applicant remained longer than authorized. An Order to Show Cause was issued on September 15, 1993. The applicant found to be deportable and was granted until October 15, 1994 to depart from the United States voluntarily in lieu of deportation. The applicant remained until July 13, 1999. The applicant was found to be inadmissible to the United States by a consular officer under § 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of more than one year. The applicant married a lawful permanent resident on June 11, 1994 who became a naturalized U.S. citizen in August 1999. The applicant is the beneficiary of an approved immigrant visa petition. The applicant was granted permission to reapply for admission on January 3, 1996. The applicant seeks the above waiver in order to return to the United States and reside with his spouse.

The acting officer in charge concluded that the applicant had failed to establish that extreme hardship would be imposed on a qualifying relative and denied the application accordingly.

On appeal, counsel the applicant discusses various elements of the matter and states that the acting officer in charge's assertion that the applicant "entered the United States on a B-2 (tourist) visa apparently secured through fraudulent means" is unsupported by any testimony or documentation.

Service instructions at O.I. 212.7 provide that after receipt of an application by a Service office, if grounds of inadmissibility other than those for which the waiver is sought are discovered, the application and all relating documents should be returned to the consular officer for reconsideration. This procedure should also be followed in cases where additional adverse information is discovered concerning grounds of inadmissibility covered by the waiver application. Since there is no evidence in the record to show that the ground of inadmissibility for fraud has been reconsidered by the consular officer, that issue will not be considered on appeal.

On appeal, counsel disagrees with the decision's focus on the applicant's violation of the terms of his visitor's visa, his employment without Service authorization, and his failure to depart when required. Counsel states that the Service Center already took into account the applicant's immigration history when it decided to approve the Form I-212 application. The Associate Commissioner is not bound by decisions of Service Center Directors. On the contrary, Service Center Directors are bound by decisions made by the Associate Commissioner.

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On appeal, counsel states that it was erroneous for the acting officer in charge to consider the applicant's immigration history as a negative factor. Counsel states that the negative factors have been reduced to zero. The present application is an application for discretionary relief. It has long been held that establishing extreme hardship and eligibility for discretionary relief does not create any entitlement to that relief; extreme hardship, once established, is but one favorable discretionary factor to be considered. See Matter of Mendez-Moralez, Interim Decision 3272 (BIA 1996); Matter of Marin, 16 I&N Dec. 581 (BIA 1978).

On appeal, counsel asserts that several factors should be considered; (1) the applicant's wife is a U.S. citizen; (2) she will suffer emotionally if the applicant's application is denied; (3) she will suffer financially if the application is denied. Counsel states that the applicant's wife suffered through her first marriage and was beaten by her first husband on their wedding day. As a result of that abuse, the psychological report in the record reflects that she suffered from major depressive disorder. The report reflects that separation of Mrs [redacted] from her husband carries the risk that she will again suffer from such a disorder. Counsel also discusses the financial problems that the applicant's wife will have to endure without his assistance.

Section 212(a)(9)(B) ALIENS UNLAWFULLY PRESENT.-

> (i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-
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> > (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to § 244(e) [1254]) prior to the commencement of proceedings under § 235(b)(1) or § 240 [1229a], and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.
> >
> > (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United states, is inadmissible.

Section 212(a)(9)(B) ALIENS UNLAWFULLY PRESENT.-

> (v) WAIVER.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No

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> court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An appeal must be decided according to the law as it exists on the date it is before the appellate body. See Bradley v. Richmond School Board, 416 U.S. 696, 710-1 (1974); Matter of Soriano, Interim Decision 3289 (BIA 1996). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statue more generous, the application must be considered by more generous terms. Matter of George, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, Interim Decision 3281 (BIA 1996).

It is noted that the requirements to establish extreme hardship in the present waiver proceedings under § 212(a)(9)(B)(v) of the Act do not include a showing of hardship to the alien as did former cases involving suspension of deportation or present cases involving battered spouses. Present waiver proceedings require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under § 212(i) of the Act, 8 U.S.C. 1182(i). Therefore, it is deemed to be more appropriate to apply the meaning of the term "extreme hardship" as it is used in fraud waiver proceedings than to apply the meaning as it was used in former suspension of deportation cases.

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board recently stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under § 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; (4) the financial impact of departure from this country; (5) and finally, significant conditions of health, particularly when tied to an unavailability

of suitable medical care in the country to which the qualifying relative would relocate.

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as an after-acquired family tie in Matter of Tijam, Interim Decision 3372 (BIA 1998) need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter entered the United States in 1990, remained longer than authorized, and married his spouse in 1994 while in removal proceedings. He now seeks relief based on that after-acquired equity. However, as previously noted, a consideration of the Attorney General's discretion is applicable only after extreme hardship has been established.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under § 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.